condition is clearly stated by Pollock C.B. and by Parke B. in *Brandford v. Freeman*[3]. Pollock C.B. in that case cited from his own judgment in *Edwards v. Mathews*[4] a passage in which he said "that the plaintiff or defendant having been called on to begin, when proof of the issue lay on his adversary, is not a sufficient ground for a new trial, unless it is manifest that the course of justice has been thereby interfered with, and some substantial injury effected." Parke B. said. "This Court has settled, that when there has been a mere error with respect to the order of beginning, as deduced from the pleadings, no new trial ought to be granted, but that it is otherwise if the error has led to substantial injustice." In *Sanders v. Sanders*[5], Jessel M.R., dealing with an application to bring forward fresh evidence before the Court of Appeal said :—

"The application is for an indulgence. He might have adduced the evidence in the Court below. That he might have shaped his case better in the Court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in Court. The exact point on which evidence is wanted having thus been discovered, to allow fresh evidence to be introduced at that stage would offer a strong temptation to perjury."

These considerations apply with at least equal force when the application is for a new trial. Their Lordships must therefore consider whether the appellant has succeeded in making out a case of manifest injustice. He can do this by satisfying the Board that there is a strong probability that he has been prejudiced by the error of the Trial Judge in throwing the *onus* on his opponent. In considering this question their Lordships are not disposed to attach importance to the fact that at the trial the appellant's advocate himself appears to have taken the initiative in inducing the error or to the fact that the respondent's advocate agreed that the *onus* lay on him and then changed his attitude in the Court of Appeal. The question where the *onus* lies is a question of law and an admission of law may be subsequently withdrawn. There is also some reason for thinking that the two advocates were only stating to the Trial Judge what at the time was held by the Courts of first instance to be the correct rule.

What is said is that at the moment when the respondent's only witness left the witness box, the appellant's counsel had to make up his mind whether he would adduce any evidence either to establish his own case or to rebut the respondent's case. He had in the appellant's attorney Karuppiah a witness present and available whom he might have called and who might have said that he was attorney for the appellant in the occupation period. Such evidence, if believed, would have given value to his own affidavit and would also have discredited the evidence for the respondent. It must, it was urged, be assumed that Karuppiah could have given this evidence for to suppose otherwise would be to assume that his affidavit was put forward dishonestly and for the purpose of deceiving the Court, and that was not a permissible assumption.

Ingenious as the argument is, their Lordships are unable to give their assent to it. It is all speculation and, if there were substance in it, it ought to have been developed in the Court of Appeal. It is going too far when it is said that an advocate did not adduce evidence which would have been so important to his case merely because he had in his favour a ruling on *onus* and because he had formed a low opinion of his adversary's evidence and believed that the Judge would reject it. It is at least as probable that the appellant's advocate did not call Karuppiah because he feared that his evidence would not help or might even harm his case. But this is also a speculation. Their Lordships do not choose between the various possible explanations of the course taken by the advocate and they certainly make no reflection whatever on his conduct of the case. Their opinion is that the appellant has failed to show with any probability that injustice or prejudice resulted from the ruling on *onus*.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

TAY HEAN SENG v. CHINA INSURANCE CO., LTD.

[C. A. (Mathew, C.J. (F.M.), Brown and Knight, JJ.) January 27, 1953]

[Singapore — Civil Appeal No. 28 of 1952]

Insurance — Motor cycle insurance — Effect of additional typewritten words added at end of Policy contradicting printed words — Question of whether added words were contradictory — Whether plaintiff entitled to rectification.

The appellant had bought a motor cycle from a shop and had asked the dealer to arrange insurance for him. He asked for a policy covering himself only driving, pillion riding, comprehensive. The dealer telephoned to the clerk in charge of the respondent Company and asked for cover for the motor cycle in those terms. The respondent Company agreed to provide that cover and issued a cover note which was delivered to the motor cycle dealer who obtained registration of the motor cycle, and was then provided with a certificate of insurance by the respondent Company. The certificate of insurance was in the usual form and the appellant thereupon paid the premium, took away the motor cycle and did not receive the policy of insurance until some three weeks later.

When the policy was delivered to the appellant it contained a clause under section II dealing with Third Party liability which excluded liability to any person being carried in or upon the motor cycle. However, at the end of the policy under the printed words "premium" were added:—

"$56.25 (additional premium for pillion riding)."

An accident occurred in which a pillion passenger while being carried by the appellant was killed. Judgment and costs to the extent of $12,994.40 was awarded against the appellant who now seeks to recover this sum

from the respondent Company and also a declaration to the effect that the respondent Company were liable to him for all costs which he had incurred in defending the claim originally brought against him and those costs to be taxed as between Solicitor and Client.

The appellant based his claim both in the Court below and in the Court of Appeal on two grounds: (i) that the policy itself indemnifies the appellant from any injury to the pillion passenger; (ii) that if this is not so, the appellant is entitled to have the policy rectified to give him indemnity to recover on the policy so rectified.

From the evidence it seems clear that when the appellant paid the additional premium of $56.25 he expected the policy to cover a pillion passenger, and that he did not appreciate the difference between cover for pillion riding and cover for a pillion rider. On the other hand, the respondent Company never issued cover for pillion passengers according to its customary practice because the risk is too great and treated the additional premium merely to cover the additional risk when there is a pillion passenger.

In the Court below, Sir Charles Murray-Aynsley, C.J. gave judgment for the respondent Company. His Lordship held: (a) when there is a contradiction between printed words and typescript, it may be necessary to reject printed words in favour of typescript. But where printed words and typescript can be read together to give a reasonable meaning, reasonable from the commercial point of view, the printed words will not be rejected; (b) the insured is not obliged to accept the usual policy of the Company, but when a policy is tendered the insured must promptly reject it or take steps to have it rectified.

On appeal, the Court of Appeal allowed the claim of the appellant; Brown, J. dissenting from the majority judgment.

Held: (1) (per Mathew, C.J. and Knight, J.): parole evidence as to the practice of the respondent Company cannot be admitted to construe the meaning of the policy and to vary it. There is nothing in the policy which excludes liability if a pillion passenger is carried, so that the typewritten words "additional premium for pillion riding" must have been added for the purpose of making the policy cover liability in respect of injury to a pillion passenger; (2) (per Mathew, C.J. and Brown, J.): on the ground of rectification, the appellant must fail as the two parties were never **ad idem**. Rectification can only be granted where the document fails to represent the common intention of the parties (Knight, J. held it was not necessary to decide on this point).

Per Brown, J.: to construe the typewritten words to mean "additional premium for injuries to pillion rider" and to delete the clear and express exclusion contained in section II would be to place a construction on those words which in their ordinary and natural meaning they cannot bear.

COURT OF APPEAL.

Denis Murphy for the appellant.

K. A. Seth and *A. J. Braga* for the respondents.

Cur. Adv. Vult.

Mathew, C.J., (F.M.) : — The appellant bought a motor cycle from a motor cycle dealer, Kwan Kok Choon, whose shop is known as Chop Chin Huat. Kwan Kok Choon asked the appellant whether he wished him to arrange insurance for him, and the appellant told him to arrange insurance to cover "rider, pillion rider, comprehensive". Kwan Kok Choon then rang up the respondent Insurance Company and gave instructions to the clerk of the respondent company. These instructions were recorded in a proposal form, which the appellant never saw, and was used later for completing the policy which in due course was issued to the appellant.

It is perfectly clear from the evidence that although the appellant wished to be covered for injuries which might be occasioned to a passenger carried on his motor cycle, the respondent company were only instructed by Kwan Kok Choon to issue a comprehensive policy which would cover the appellant when carrying a pillion passenger.

An accident occurred on the 27th November, 1950, and the pillion passenger carried by the appellant was killed. The appellant informed the respondent company of the accident, and the company immediately repudiated liability. In proceedings brought by the administrator of the deceased pillion passenger damages and costs to the sum of $12,994.40 were awarded against the appellant. It is this sum which the appellant now seeks to recover from respondent company.

The case for the appellant was argued in the Court below, and in this Court, in two alternative ways; first, that the policy issued by the company by its terms indemnifies the appellant against the claim in respect of which judgment has been given against him, and second, that if this is not so, the appellant is entitled to have the policy rectified to give the indemnity and to recover on the policy so rectified.

On the second ground the appellant must fail. It is abundantly clear that the two parties were never *ad idem* and that the respondent company issued, on the instructions of the motor cycle dealer, the appellant's agent, a policy which was not intended to cover injuries occasioned to a pillion passenger.

The first ground, which is purely a question of construction, is more difficult. The policy which was issued to the appellant contains the following clause (under Section II) which deals with liability to third parties :—

> "1. Subject to the limits of liability stated in the Schedule hereto the Company will indemnify the Insured in the event of accident caused by or through or in connection with any motor cycle described in the said Schedule against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of
>
> (a) death of or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the Insured and excluding liability to any person being conveyed in or on such Motor Cycle unless such person is being carried by reason of or in pursuance of a contract of employment;
>
> (b) ....."

This clause expressly excludes liability for death or bodily injury to any person carried as a pillion passenger. At the end of the policy there is the following typewritten addition :—

> "Premium: $112.50
> 56.25 (additional premium for pillion riding).
> $168.75
> .50 stamp duty.
> $169.25."

The short question to be answered is, does the typewritten addition have the effect of contradicting the express exclusion of liability in respect of death or bodily injury to a pillion passenger. The practice of the respondent company is clear. If the assured pays an additional premium he is covered in respect of injury to himself and his cycle and to third parties other than the pillion passenger. If he does not pay the additional premium, the following addition is made to the policy:—

"It is hereby understood and agreed that no liability shall attach to the company under this Policy in respect of accidents occurring while the Motor Cycle specified in the Schedule is being used, without sidecar attachment, for conveying a pillion passenger."

The learned Chief Justice deals with the question of construction as follows:—

"The addition of pasted-on slips or typescript words to insurance policies is apt to cause difficulties, because such additions frequently affect printed words and it is unusual to make the corresponding corrections to the printed words. It is, therefore, sometimes necessary to reject printed words in favour of typescript. Before this can be done it is, I think, necessary to have a contradiction. I do not think it can be done where printed words and typescript can be read together and give a reasonable meaning, reasonable from the commercial point of view. There might be a grammatical reconciliation which would be nonsense from the commercial point of view. Here I think the two can be read together and the result is from a commercial point of view reasonable; it defines what is the current practice. Read in this way, the liability for which the plaintiff contends is excluded."

The learned Chief Justice finds no contradiction between the typewritten addition and the relevant words in clause 1 of Section II as they are, bearing in mind current commercial practice, not contradictory. I am in complete agreement that, with the aid of the parole evidence that was called, this typewritten addition does not affect the express exclusion in clause 1 of Section II. But in my view regard cannot be had to the evidence given as to the practice of the respondent company in construing the meaning of the policy which was delivered to the appellant.

There is nothing in the printed policy which indicates that no liability will attach to the company if an accident occurs when a pillion passenger is carried. What, therefore, is the meaning of the words "additional premium for pillion riding"? To permit a pillion passenger to be carried it cannot mean, for there is nothing in the policy which excludes liability if a pillion passenger is carried. The only reference to a passenger in the policy is in clause 1 of Section II, and unless the additional words are to be given no meaning, they must have been added for the purpose of making the policy cover liability in respect of injury to a pillion passenger. If any other construction is put on the policy, an additional premium is being charged for no benefit.

Taking the view that I do, I would allow this appeal and enter judgment for the appellant for the amount claimed and the declaration sought with costs as between solicitor and client here and in the Court below. The deposit in Court will be refunded to the appellant.

Brown, J.: —By Section II of this policy liability for the death of or any bodily injury to a pillion rider is expressly excluded. But in the Schedule an additional premium of 50% has been charged, which (in typewritten words) is expressed to be an "additional premium for pillion riding."

It is clear that the appellant had the question of pillion riding very much in mind, because when he received the Certificate of Insurance he at once pointed out that it made no mention of it; and again when he received the policy he telephoned to the respondent company and pointed out that, although pillion riding was included in the policy, it still was not mentioned in the Certificate.

But the main question of fact which was in dispute in the Court below was whether the appellant specifically stated that he wanted cover for a pillion rider. The evidence on this point was contradictory. But the learned Chief Justice expressed his view that he did not. And I think we must take it that the appellant failed to establish the fact that he stipulated for cover for a pillion rider.

Upon the facts I think it is clear beyond dispute:—

(a) that the appellant did not appreciate the distinction between cover for the increased risk to himself, third parties and his vehicle which would be incurred by riding his motor-cycle with a pillion-rider on the back, and cover for death or injuries sustained by a pillion-rider;

(b) that the appellant believed that his contract included cover for the latter;

(c) that the respondents believed that they were contracting to give him cover only for the former.

Mr. Murphy, on behalf of the appellant, has contended that there was a completed contract prior to the issue of the policy, by which the respondents agreed to give full comprehensive cover (which, he says, must include cover for injuries to a pillion rider). He says that the offer was contained in the proposal form and that the respondents accepted the offer when they issued the certificate and accepted the premium. The proposal form (in question 1) gave a choice of three policies — (a) Full Comprehensive, (b) Third Party, (c) "Act only". The appellant never saw the proposal form. This was filled in by a clerk in the respondents' office from information supplied by Kwan Kok Choon. The appellant had said that he wanted a Full Comprehensive policy. Therefore the clerk wrote in the space provided in the proposal form the word "Comprehensive", which was in contradistinction to the two other kinds of motor accident policy which the respondents supply viz. 'Third Party,' or 'Act only.' I agree with Mr. Murphy that the contract was complete before the policy was issued. But it was a contract to hold the appellant covered by the

respondents' usual form of Comprehensive policy. This expressly excludes cover for injuries to a pillion rider; and this was the policy which was subsequently issued (with the addition of the typewritten words).

The appellant, having read the policy and believing that the typewritten words gave cover for injuries to a pillion rider, was satisfied. One of the grounds on which this appeal has been argued is that the appellant was correct in that view, and that upon a true construction of the policy injuries to a pillion rider are covered. I was impressed by the argument that if the typewritten words had not been inserted the policy itself would not prevent the insured from carrying a pillion rider, and that therefore the only meaning which can attach to the typewritten words is that, for the 50% additional premium, cover is provided for injuries to a pillion rider. Can it be doubted that if the appellant had made no mention of pillion riding and the typewritten words had not been inserted and no additional premium charged he would be entitled by the terms of the policy to all the benefits, which the respondents say that he is entitled to now? The answer to that is, I think, to be found in the evidence of Yin Choy Cheong, who said that if nothing is said "no pillion riding" is endorsed; and the form of endorsement appears at page 54 of the record. But however that may be, we are asked to say that upon a proper construction of this policy without considering the extrinsic evidence, the policy covers the insured for injuries sustained by a pillion rider. Giving all due weight to the "contra proferentes" rule, it seems to me that to construe the typewritten words to mean "additional premium for injuries to a pillion rider" and thus to delete the clear and express exclusion contained in Section II would be to place a construction on those words which in their ordinary and natural meaning they cannot bear. And I agree with the learned Chief Justice that they cannot be made to contradict the express exclusion contained in Section II.

The other ground upon which this appeal has been argued is that the appellant is entitled to rectification of the contract upon the ground that it does not represent the agreement of the parties that full comprehensive cover should be given. But rectification can only be granted where the document fails to represent the common intention of the parties, and in order to make it conform to what they have in fact agreed. I am satisfied upon the evidence that there was never agreement between the parties that death or injuries sustained by a pillion rider should be covered; and for this purpose the evidence was properly admitted. It is to me quite clear that the parties were at no time *ad idem* upon this matter.

I would add that I fully associate myself with the sympathy which has been expressed for the appellant. It seems to me that he shewed no less care in endeavouring to obtain the cover which he wanted then was reasonably to be expected, and that an ordinary member of the public who is unversed in insurance practice is not reasonably to be expected to understand the distinction between cover for "pillion riding" and cover for a pillion rider. On the other hand it is to be expected of an insurance company that, before accepting a customer's money, they will take every reasonable step to ensure that he fully understands the benefits for which he is paying. I feel constrained to say that the procedure adopted by the respondents seems to me to have been open to criticism. They have a form of Comprehensive policy which on the face of it, while excluding liability for death or injuries to a pillion rider, does not exclude cover for all other risks if a pillion rider is carried. But this apparently is not the case, because unless the insured pays an extra premium of 50% an endorsement of "no pillion riding" is added. In this case the appellant paid the extra 50%. He thereupon became entitled to the cover which the policy, on the face of it, provides. The typewritten words were not necessary. Mr. Seth has told us that they were intended to be explanatory. But they could only serve to explain to a person who understood that the policy (without the typewritten words) does not mean what it says and who appreciated the distinction between cover for the increased risks attendant on pillion riding and cover for death or injuries to a pillion rider. To any person who did not have that understanding the typewritten words could only serve to confuse. In assuming that the appellant would understand the distinction I think that the respondents assumed an understanding on his part which it was not reasonable to assume. In the view which I take of this case it is a hard case. Nevertheless, in my opinion the parties did not contract that cover should be provided for death or injuries to a pillion rider, and I would reluctantly dismiss this appeal with costs.

Knight, J. : — This is an appeal from a decision of the learned Chief Justice in which he found in favour of the respondent Company and dismissed the appellant's claim with costs.

It is unnecessary to set out the facts which appear fully in the proceedings of the Court below and the only question for decision is whether the learned Chief Justice was right in holding that the appellant's pillion rider who was killed on November 27th 1950 following upon a road accident was not covered by a contract of insurance made between the respondent Company and the appellant on September 21st 1950 and subsequently affirmed by the Company's policy of the same date.

It is not in dispute that on September 21st 1950 the appellant purchased a motor cycle and arranged through the salesman of the shop in which he bought it that the latter should effect for him a comprehensive policy of insurance covering the rider, a pillion rider (or pillion riding) and the machine itself. The salesman forthwith approached the respondent Company from which he received commission for transactions of this nature and a certificate of insurance was issued which referred in general terms to the Motor Vehicles Third Party Risk Regulations and Part II of the Traffic Ordinance 1941. I need hardly say that those vague terms must have been quite incomprehensible to the appellant but in evidence he stated that they did not satisfy him and that he asked the salesman to arrange comprehensive cover for a pillion passenger. Some three weeks later he received a policy which showed *inter alia,* that .the premium payable was $112.50 plus $56.25 — the latter figure being shown as "an additional premium for pillion riding". On receipt of this document, says the appellant, he was fully satisfied that his pillion passenger was covered and he did not trouble to read the whole of the policy, in Clause 1 (a) of Section II of which, had he done so, he would have been that liability to persons being conveyed on the motor cycle was expressly excluded. In all fairness to the appellant who can possibly blame him for thinking he was fully covered? He asked for cover in respect of his passenger, he paid a considerably enhanced premium and the typed words I have quoted above must have convinced him — as they would anyone else — that he had got exactly what he asked for.

Such, unhappily, was not the case. In the Court below the manager of the respondent Company explained that his Company never provided cover for pillion passengers. The risk, he said, is too large and the premium too small. The extra premium paid by the appellant, says the Company, merely covered the appellant, the motor cycle and 3rd Party risks (other than the pillion rider) should an accident occur at a time *when a pillion passenger was being carried on the machine.* It follows, therefore, that according to the Company, should a motor cyclist who is insured with them carry a pillion passenger and become involved in an accident — neither the cyclist, nor the machine are covered unless the enhanced premium has been paid and claims paid to third parties would be recoverable from the insured.

The appellant's case in the Court below and here has been argued on two grounds (1) that on the natural construction of the policy itself without the admission of parole evidence to vary it, the appellant's pillion passenger was clearly covered and (2) that if he was not, the policy should be rectified to cover such passenger. Parole evidence, of course, tending to vary the written contract was inadmissible on the first of those grounds but became admissible on the second as relevant to proving that the contracting parties minds were not *ad idem.* As I see it, however, unless it is ambiguous, I should be wrong in construing this contract other than from its written terms and the practice of Insurance Companies in Singapore as testified to by the Company's witnesses, is not only irrelevant — but should be completely disregarded.

Now as regards the policy itself (*without recourse to the evidence*) could any reasonable man construe it in the way the respondent Company suggest or indeed, in any way other than it was construed by the appellant? If the endorsement did not mean that the passenger was covered why should the appellant pay an enhanced premium —so far as the policy discloses — for no benefit whatsoever? In my opinion, the only construction to place upon it is that the typed endorsement in its ordinary meaning contradicts the provisions of Clause 1 (a) of Section II unambiguously. In such circumstances the printed words must be rejected in favour of the typed and the policy in the form issued to the appellant can only mean that his passenger *was* fully covered. I would emphasize that nowhere in the policy is there anything to the effect that a cyclist paying the bare premium is not covered when carrying a passenger and in the absence of such a warning no one, in my opinion, reading the typed endorsement together with Section II could possibly reach any other conclusion except that the additional premium covered a pillion passenger thus overriding the exclusion of liability in Section II. Again, as Mr. Murphy contended strongly for the appellant, if the endorsement does not cover liability to such a passenger it is completely meaningless until explained by evidence which is inadmissible when construing a contract which in my opinion is unambiguous in its ordinary meaning.

I appreciate that the respondent Company had no intention of covering the pillion passenger in this case but frankly cannot sympathise. Sympathy for an Insurance Company would, perhaps, in any event be a somewhat unnatural emotion — but how incredibly careless this Company has been in relation to its customers and what more natural mistake could the appellant have made when thinking he was fully covered?

In view of the above finding it is unnecessary to deal with the rectification point and I would allow this appeal and award the appellant judgment for $12,994.40 as claimed in paragraph 9 of the Statement of Claim together with the declaration sought in paragraph 10. He will also receive costs as between solicitor and client plus expenses in this Court and in the Court below.

Appeal allowed.